Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-374

In re:

LAWRENCE N. JOLLY, DEBTOR,

C. KENNETH STILL, CHAPTER XIII, TRUSTEE, Petitioner,

v.

CHATTANOOGA MEMORIAL PARK, Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit**

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 13, 1978.

### CITATIONS TO OPINIONS BELOW

The unpublished opinion of the Bankruptcy Judge was filed November 4, 1975, and a copy is attached as Appendix A, pages A-1-A-11. The unpublished opinion to the United States District Court for the Eastern District of Tennessee, Southern

Division, affirming the judgment of the Bankruptcy Court was entered April 1, 1976 and a copy is attached as Appendix B, pages A-12-A-18. The opinion of the United States Court of Appeals for the Sixth Circuit reversing the District Court was entered April 13, 1978 and is reported at 574 F.2d 349 (6th Cir. 1978). A copy is attached as Appendix C, pages A-19-A-24. The unpublished order of the Court of Appeals denying a petition for rehearing was entered June 6, 1978 and a copy is attached as Appendix D, page A-25. The Court of Appeals denied petitioner's motion for a stay of mandate on June 26, 1978 and a copy of the denial is attached as Appendix E, pages A-26-A-27.

Petitioner applied to the Honorable Potter Stewart, pursuant to 28 U.S.C. § 2101(f), for stay of proceedings pending filing a petition for writ of certiorari. The application was considered by the Honorable Byron R. White in the absence of Mr. Justice Stewart and was denied on August 1, 1978. A copy of the letter notifying petitioner of the denial is attached as Appendix F.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed in accordance with a directive from the Office of the Clerk of this Court (Appendix G) and in accordance with *U.S. v. Healy*, 376 U.S. 75 (1964).

## QUESTION PRESENTED

Debtor contracted with Respondent, a cemetery company, for the purchase of "interment rights" in burial lots and for perpetual care of the lots, signing an installment note for the contract price. Under the contract these rights were not to be conveyed



to Debtor until the note was paid. Debtor defaulted in payment and Respondent obtained a default judgment against him on the note, not the contract, in state court. Debtor filed a Chapter XIII petition in bankruptcy, and submitted a plan for liquidation of his debts, which was approved by the Bankruptcy Court. Respondent filed a claim in the full amount of Debtor's remaining obligations. Trustee filed a statement of executory contracts, which stated that the contract between Debtor and Respondent was executory, and which rejected it as burdensome. The Bankruptcy Court allowed the rejection finding that (1) Debtor had not paid the contract price in full, (2) the "interment rights" in the lots had not been conveyed to Debtor, and (3) Respondent would suffer no damage from rejection of the contract as executory because the amount Respondent could get from reselling the lots plus the amount paid on the note and judgment would more than equal the amount of the claim. (Appendix A, pages A-2-A-3) The District Court affirmed the Bankruptcy Court (Appendix B, page A-18), but the Court of Appeals reversed, holding that because the note had become in default the contract was no longer executory. (Appendix C, pages A-23-A-24) The question thus presented in this case is:

> Whether a contract in which a breach has occurred, but which continues with mutual future obligations on each party because of affirmance of the contract by the non-breaching party, is an "executory contract" for the purposes of the Bankruptcy Act, rendering the contract subject to rejection by a trustee in a bankruptcy proceeding.

The Bankruptcy Court and District Court answered "Yes," while the Court of Appeals answered "No." Petitioner contends that the Bankruptcy Court and District Court were correct and that the Court of Appeals should be reversed.

## FEDERAL STATUTES AND RULES INVOLVED

The statutes involved are Section 613(1), 642 and 646(6) of the Bankruptcy Act (11 U.S.C. §§ 1013(1), 1042 and 1046(6)), and Rule 13-604 of Bankruptcy Procedure. Copies of these statutes and rules are attached as Appendix H.

## STATEMENT OF THE CASE

Petitioner is Wage Earner Trustee, under Chapter XIII of the Bankruptcy Act, of the estate of the debtor, Lawrence N. Jolly. Respondent is a cemetery company selling interment rights in burial lots and perpetual care services for the burial lots.

By contract dated July 29, 1972, Debtor contracted with the Respondent for the purchase of "interment rights" in burial lots and for perpetual care of the lots. Debtor was unable to pay the contract price in cash and executed a note payable in forty-eight (48) installments commencing in September, 1972, and terminating in August, 1976. Debtor defaulted on the installment payments and Respondent, accelerating the payment of all unpaid installments, brought suit in state court and obtained a default judgment on the note, not the contract. Respondent elected to enforce the contract in state court and did not exercise its option to terminate the contract, which the Court of Appeals noted it had a right to do. (See 574 F.2d at 350 and Appendix C A-19.)

Debtor filed a petition under Chapter XIII for a Wage Earner Plan on January 27, 1975 (Case No. BK-1-75-0187), and Respondent filed a claim in the case, seeking the amount of the judgment less partial payments made by Debtor.



Debtor has not paid the judgment. The "interment rights" in the burial lots, which were not to be conveyed to Debtor until the purchase price had been paid, have not been conveyed to him by Respondent.

Debtor desired that the contract be rejected as part of the Wage Earner Plan, and the trustee rejected it under 11 U.S.C. §1013(1) and §1046(6) as being executory. The rejection provided that the Respondent could file a claim for damages pursuant to 11 U.S.C. §1042. The Bankruptcy Court approved the rejection, treated Respondent's claim as one for damages and reduced it by its full amount upon a finding, which has not been contested by Respondent, that no damages remained after deduction from the claim of the value of (a) the down payment of the Debtor, (b) the payments made by the Debtor to the Respondent, (c) the payments made by the Debtor on the judgment, (d) the fact that Respondent could resell the lots and (e) the fact that Respondent would be released from its future perpetual care obligations. (Appendix A, pages A-2, A-3)

The District Court affirmed the Bankruptcy Court concluding that the contract was executory and subject to rejection. (Appendix B) The Court of Appeals reversed on the ground that the breach of the contract by Debtor in failing to make payments as agreed rendered it non-executory and not subject to rejection by the trustee, viz:

> When a contract has already been breached, that choice [to reject, or not to reject, a contract otherwise executory] is no longer available. (574 F.2d at 351 and Appendix C at A-23).

The Court of Appeals noted the existence of a judgment only as evidence of the Debtor's breach on the note.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it conflicts with prior opinions of this Court defining an executory contract and conflicts with decisions of other Courts of Appeals which have applied the rejection/affirmation provisions of the Act in the same or similar fact situations. Also the decision denies the right of a bankruptcy trustee to reject as executory any contract in which a breach has occurred prior to bankruptcy, thus violating both the spirit and purpose of the Bankruptcy Act, and raising an important question of federal law which should be settled by this Court.

1. **The Court of Appeals' decision, which excludes the facts of this case from the definition of an executory contract, conflicts with earlier decisions of this Court which define the term "executory contract."** See *Farrington v. Tennessee*, 95 U.S. 679 (1878); *Fletcher v. Peck*, 10 U.S. 87 (1810). In *Farrington* this Court said:

> Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done . . . An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. (95 U.S. at 683)

To the same effect is *Fletcher*:

> A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; . . . A contract executed is one in which the object of the contract is performed; . . . (10 U.S. at 136-137)



The decision of the Court of Appeals ignores the facts that (1) Debtor has not paid the purchase price now reduced to judgment, (2) Respondent has not conveyed "interment rights" in the burial lots, and (3) such duties as perpetual care and maintenance of a trust fund are matters of future performance by Respondent. Any one or more of these unperformed parts of the contract bring it within the concept of an executory contract as found in 4A *Collier on Bankruptcy*, ¶ 70.43[2] at 522 (14th Ed. 1978), where it is said:

> As long as there remains any part of the contract unperformed, the contract is executory.

The term "executory contract" is not easily defined:

> If a transaction is fully executed on both sides, it is not properly described as a contract. The term "executed contract" has, however, been sometimes used to describe executed consensual agreements, like sales completely carried out on both sides. The same term has also been used to describe unilateral contracts which are executed only on one side, as sales where the price has not yet been paid. Since the phrase if understood in the former meaning contains an improper use of the word "contract," and in any event is ambiguous, its use is better avoided. The same criticism, so far as ambiguity is concerned, applies to the phrase "executory contracts." All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts. (1 *Williston, Contracts*, § 14, at 27-28.)

However, in the definition of an "executory contract" previously handed down by this Court and from the context of the Bankruptcy Act, it is clear that a contract such as exists between Debtor and Respondent is executory and subject to rejection by a bankruptcy trustee.

2. **The Court of Appeals' decision directly conflicts with a decision of the Second Circuit with regard to whether breach of a contract renders it non-executory, and conflicts with other Circuits' applications of this Court's definition of an "executory contract."**

In *Application of Baby World Company*, 236 F. Supp. 283 (E.D.N.Y. 1964), aff'd. per curiam 339 F.2d 258 (2d Cir.), the trustee in bankruptcy desired to affirm an executory contract. The creditor/claimant had contracted to sell his one-half interest in the debtor corporation to the debtor for $250,000; $150,000 of the purchase price was payable in 35 equal monthly installments. Under the sales contract, upon default the claimant could either (1) have his stock returned and regain control of the debtor, while retaining half of the money already received from the debtor, or (2) keep all of the money received but give up the stock and any further claim for purchase price. The debtor defaulted on the note April 2, 1963, and on April 30, 1963, filed for reorganization under Chapter XI of the Bankruptcy Act.

The debtor in *Baby World* contended that the agreement could be, and therefore ought to be, enforced as written, despite the genuine breach which occurred before the proceedings in the Bankruptcy Court. The creditor/claimant argued that in light of the genuine breach of the contract and in view of the fact that the debtor's invocation of the Bankruptcy Act was a "breach" of the agreement with the claimant, the first alternative under the terms of the agreement was so valueless and placed far beyond worthwhile performance as to preclude the debtor from insisting that the creditor choose between alternatives 1 and 2. In essence, the creditor/claimant argued that the agreement had been terminated. The Bankruptcy Court, affirmed by the District Court and the Second Circuit, agreed with the debtor that the breach had not terminated the contract, and therefore the claimant was required to surrender remaining unpaid payment notes to the debtor and release the stock from escrow to the debtor. The thrust of the decision was to allow the bankruptcy trustee to affirm the breached executory contract between the debtor and the creditor/claimant.



Thus, *Baby World* contains facts even less favorable to the trustee than those in the case sub judice, since here the creditor has exercised an option to affirm the contract and seeks to enforce the Debtor's obligation. In conflict with *Baby World*, the Sixth Circuit Court of Appeals concluded that "when a contract has already been breached, that choice [to reject or not reject an otherwise executory contract] is no longer available." 574 F.2d at 351, and Appendix C at page A-23. In so holding, the lower Court cites 9 *Collier on Bankruptcy* ¶7.15 (14th Ed. 1976). Yet, the treatise simply furnishes no support for the Court's conclusion. *Collier* merely says that the holder of an executory contract with a bankrupt becomes a creditor upon actual or anticipatory breach of the contract. Nothing is said or intimated to the effect that breach by the debtor denudes the contract of its otherwise executory character. To the same effect is *In Re Greenpoint Metallic Bed Company*, 113 F.2d 881 (2d Cir. 1940), also cited in the Court of Appeals' opinion.

In addition, the Sixth Circuit erroneously relied on *In Re Commodity Merchants, Inc.*, 538 F.2d 1260 (7th Cir. 1976), as an example of a case in which a breached contract was found not to be executory. In *Commodity Merchants*, the creditor had the right to cancel the contracts if debtor's financial position became unsatisfactory, and ". . . on December 19, 1972 ADM's credit manager telegraphed CMI that four contracts were cancelled . . ." (538 F.2d at 1262) and ten days later CMI was adjudicated bankrupt. The court rejected the trustee's claim that the contracts were still executory after

the creditor had exercised its contractual right to cancel them.

Thus, the Seventh Circuit was dealing with a contract which *by its terms* was *terminated* and hence, not executory:

> The bankruptcy trustee no longer seriously argues that the contracts were executory when he attempted to assume them under §70b of the Act. The purchase contract (No. 10233) had already been breached by CMI [the debtor, bankrupt]. Paragraph 12 of *the contract permitting ADM to terminate upon CMI's unsatisfactory financial condition* is a garden variety contractual clause and consistent with Article 2-609 of the Uniform Commercial Code dealing with the right to adequate assurance of performance. Ill.Rev.Stats. (1975), Ch. 26, §2-609. The validity of such a clause is well settled, and *CMI concedes that its financial condition permitted ADM to terminate the contract* on December 19, 1972, ten days before the filing of the bankruptcy petition. Accordingly, §70b of the Bankruptcy Act did not permit the trustee to assume these contracts. (538 F.2d at 1263, emphasis added; footnote omitted).

It is clear from the foregoing language, which the Court of Appeals omitted from its opinion, that the facts involved in *Commodity Merchants*, upon which the Court of Appeals relied to support the conclusion and analysis regarding the breach of a contract, is inapposite.

There is agreement among the Circuit Courts of Appeals that a *terminated* contract is not executory. See, e.g., *Crittenden v. Lines*, 327 F.2d 537 (9th Cir. 1964), *Tobin v. Plein*, 301 F.2d 378 (2d Cir. 1972), *In Re Commodity Merchants, Inc.*, 538 F.2d 260 (7th Cir. 1976). The case sub judice involved a creditor, claimant, who elected *not* to terminate the contract (which was its option under the terms of the contract) but elected to affirm and continue all obligations under the contract, the only change being the acceleration (not the



execution) of the debtor's obligations to make them immediately due and payable.

In the Fifth Circuit case of *In Re American Magnesium Company*, 488 F.2d 147 (5th Cir. 1974), based upon a strikingly similar position of the parties, that court defined an executory contract to be one in which:

> . . . something remains to be done by one or more of the parties. An executory contract is one in which a party binds himself to do or not to do a particular thing, whereas an executed contract is one in which the object of the agreement is already performed. *Farrington v. Tennessee*, 95 U.S. 679, 24 L. Ed. 558, *Fletcher v. Peck* (U.S.), 6 Cranch 87, 3 L. Ed. 162. An executory contract is obviously what this court is faced with. Ozark agreed to transfer all its interest in certain leases to American Magnesium and further agreed to refrain from purchasing other releases in this specific area. American Magnesium agreed in return to immediately pay Ozark a cash amount ($137,-879) and also to pay Ozark a royalty on all magnesium produced in the Snyder plant. *Both parties had ongoing commitments. There is no point at which it could be said that the contract was completed.*
>
> * * * * * * *
>
> This court then finds that a contract did exist, it was executory, the bankruptcy judge was correct in allowing its rejection. (488 F.2d at 152, emphasis added)

In the present case both Debtor and Respondent had ongoing obligations. That of Debtor was to pay the judgment obtained against him in the state court and that of Respondent was to transfer "interment rights" in the burial plots and render perpetual care and other services in the future. As in *American Magnesium, supra*, "there is no point at which it could be said that the contract was completed."

3. **The Court of Appeals' holding that Debtor's default in an otherwise admittedly executory contract renders it non-executory is a novel one and should be reviewed by this Court.**

(a) The statute permitting rejection of executory contracts contemplates that they will be in default when the Chapter XIII proceedings are instituted. Bankruptcy Act §642, 11 U.S.C. §1042, provides that after rejection of an executory contract any person injured by the rejection shall be deemed a creditor and may file his claim for damages. It is inherent in §1042 that a debtor filing a Chapter XIII petition will be in default on some of his contracts. In the statutory example of a landlord under a lease the claim may be filed for future rent for a specified period, "*plus unpaid accrued rent.*" "Unpaid accrued rent" can only mean that the lessee-debtor is in default on and has breached the rent-paying provisions of the rental agreement. Yet under the Sixth Circuit's decision a lease which is breached by default with regard to its rent-paying provision could not be rejected as executory by the trustee or the Court. Such a decision is simply not in keeping with the purpose and intent of the statutory provision in question.

*Collier* refers to the rejection of executory contracts as an extension of the "principle that the trustee in bankruptcy may renounce title to, and abandon, burdensome property." 4A *Collier on Bankruptcy* ¶ 70.43[1] at 516 (14th Ed. 1978). See, also, Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 440 (1973). Thus, the rejection provisions enable a trustee to reject burdensome obligations as well as, in the same proceeding, liquidating and fixing the balance due upon the creditor's claim. It is important to note that the consequences of the lower court's action will extend far beyond the confines of Chapter XIII and will affect the administration of all forms of bankruptcy and reorganization. 11 U.S.C. § 110b (Chap. I-VII "Straight Bankruptcies"); 11 U.S.C. § 205b (Chap. VIII "Railroad Reorganizations"); 11 U.S.C. § 516(1) (Chap. X "Corporate Reorganizations"); 11 U.S.C. § 713(1) (Chap. XI "Arrangements"); 11 U.S.C. § 813(1) (Chap. XII "Non-corporate Realty Arrangements").



The purpose of Chapter XIII (and all other remedial provisions of the Act) is to give relief to debtors experiencing financial difficulties and it is unthinkable that a debtor would institute proceedings under these chapters if he were current in all his obligations. Yet, under the Sixth Circuit's decision, he cannot be relieved of a burdensome contract if he is in default under it. Similarly, for example, no debtor in possession under a commercial rehabilitation chapter will be able to reject its burdensome pre-bankruptcy obligations for the purchase of unnecessary goods or property. The impact of this decision cannot be overstated.

The clear and equitable purpose of the rejection right is to relieve the debtor of a burdensome obligation where the debtor has not received full performance by the other party to the contract and the debtor himself has not fully performed. That is the case here.

(b) The reduction of a contract obligation to judgment does not change the character of the obligation from being executory because:

> [T]he debt on which this judgment was rendered is the same debt that it was before; that notwithstanding the change in its form from that of a simple contract debt, . . . by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court. . . . (*Boynton v. Ball*, 121 U.S. 457, 466 (1886))

A judgment which affirms the contract obligation comes within the definition of an executory contract. In the noted authority on this area of law, 10 *Collier on Bankruptcy*, ¶ 22.06 at 42 (14th Ed. 1978), the following appears:

> The definition of "executory contract" is not restrictive. It does not exclude other meanings of the words, which embrace contracts dealing with any subject matter, as long as some future performance is required of the debtor.

Debtor and Respondent in this case both yet remain to perform under the judgment which was rendered in the state court; such future performance renders the obligations arising between Debtor and Respondent "executory" in nature.

The authorities construing the nature of a judgment make it clear that the trustee in this case rejected an executory "contract." While a judgment is not a contract in the strict sense of the word, since there has not been mutual voluntary assent to its terms, a judgment is frequently thought of as a contract, or a contract of record. A judgment is in the nature of a contract, and the liability thereunder is contractual in nature, like an implied contract, since a promise to pay a judgment is implied in law. Thus, an action on a judgment is looked upon as an action on a contract. *See* 49 C.J.S. *Judgments* § 6 at 30-31 (1947), and 46 Am. Jur. 2d *Judgments* § 223 at 464-465 (1969).

Almost one hundred years ago, this Court recognized the contractual nature of a judgment. The following quote is instructive:

> It is, however, permissible in all cases, where justice requires it, to inquire into the nature of the demand on which the judgment was rendered. If the judgment be rendered on a contract, that judgment is a contract, the nature and extent of the liability having been judicially ascertained.

*Walker v. Powers*, 104 U.S. 245 (1881) and see *Louisiana ex rel. Folsom Bros. v. Mayor*, 109 U.S. 285 (1883). In *Walker*, this court considered a judgment, held by the plaintiff, to determine its nature, because if the judgment was a contract, plaintiff had no right to sue a state in federal court. The Court examined the judgment and, having found it to be a contract, said that the fact that a judgment is a contract caused the action to be "a suit to give remedy on that contract, and any decree rendered by the court in favor of plaintiff would be intended to enable them to recover the money due on the contract."



## CONCLUSION

The following facts, discussed above, make this case particularly appropriate for the exercise of this Court's discretionary jurisdiction in order that this important issue of federal law be resolved for the future guidance of Bankruptcy Courts:

(1) The decision of the Sixth Circuit Court of Appeals conflicts with the prior opinions of this Court defining the concept of the executory contract.

(2) The decision also conflicts with prior applications of that definition in other circuits.

(3) The lower court's opinion, if unreversed, will adversely affect the administration of estates in all types of bankruptcy proceedings.

For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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# APPENDIX

## APPENDIX A

United States District Court
Eastern District of Tennessee

In re: No. BK-1-75-0187

Lawrence N. Jolley
Debtor

In Proceedings for a
Wage Earner Pian

### Memorandum

(Filed Nov. 4, 1975)

For its memorandum in this case the court adopts and annexes hereto its memorandum in the case of John Daniel Carpenter, No. BK-1-75-51.

The only significant difference in the two cases is the amount involved.

The agreement in this case is to purchase:

| | |
|---|---|
| 4 Adult Interment Spaces— | |
| Base Price | $476.80 |
| Care Deposit | 119.20 |
| Total Cash Price | $596.00 |

The finance charge is $132.80, making a deferred payment price of $728.80. Creditor's judgment includes $220.03 attorney fee and court cost of $9.75.

The total debt amounts to:

| | |
|---|---|
| $728.80 | —deferred payment price |
| 220.03 | —attorney fee |
| 9.75 | —court cost |
| $958.58 | |

Creditor's claim, upon a default judgment, includes the deferred payment price of "interment rights", attorney fee, and court cost. (It reflects a balance owing of $761.61. This would mean payments of $196.97, yet creditor's statement of account reflects payments of $220.85. This difference is not material to the decision in this case.)

Creditor will not have to convey to debtor four adult interment spaces and provide perpetual care, with a total cash value of $596; nor will creditor be obligated to pay its attorney $220.03, or one-third of the amount sued upon. The court takes judicial notice that one-third is paid only on the amount collected.

These two items total $816.03; and when applied toward satisfaction of balance due on creditor's claim (761.61), the debt is more than satisfied.

Accordingly, the court finds that the claim of Chattanooga Memorial Park is founded upon no present existing indebtedness.

The Court would note that the agreement was to pay the indebtedness in monthly installments for four years, with a finance charge of $132.80. The judgment taken only two years after the agreement included the total finance charge.

It will not be necessary to go further into this matter, however, since the court has already determined that there is no present existing debt.

Creditor has already received approximately two hundred dollars ($196.97 or $220.85) on interment spaces with a base selling price of $476.80. Debtor has received nothing from creditor.



There is no proof that rejection of the executory contract has damaged creditor more than the amount it has received. It can sell the same spaces again.

A judgment will enter in accordance with this memorandum.

/s/ RALPH H. KELLEY
Bankruptcy Judge

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United States District Court
Eastern District of Tennessee

| | |
|---|---|
| In re: | No. BK-1-75-51 |
| John Daniel Carpenter, Jr.<br>Debtor | In Proceedings for a<br>Wage Earner Plan |

**Memorandum**

(Filed Oct. 31, 1975)

The trustee in accordance with § 613(1) of the Bankruptcy Act and Bankruptcy Rule 13-604 filed a trustee's statement of executory contracts and therein rejected an executory contract between creditor, Chattanooga Memorial Park, Inc., and the debtor.

It was the understanding of the court that the trustee had an informal agreement with the creditor regarding damages for rejection of an executory contract and that creditor would file an amended claim. Accordingly, creditor's claim was disallowed; and creditor was allowed 30 days to file an amended claim.

Creditor filed a motion for the court to reconsider its order indicating that its claim had been reduced to judgment, and thus

it was in a different category from claims based on merely an excutory contract. It was creditor's belief that this claim should not be covered by the informal agreement with the trustee.

In view of the creditor's belief and understanding, the court will be pleased to reconsider its order.

At the hearing on creditor's motion a copy of creditor's judgment was made an exhibit. The trustee voiced objection to the claim, and proof was heard. Technical pleading would require the creditor to file an amended claim and trustee to file an objection.

Sufficient facts, however, are before the court for a determination of the controversy. The court will treat creditor's claim as amended and the trustee's pleading and oral opposition as an objection.

**Findings of Fact**

A review of the record indicates that creditor's claim is upon a default judgment. The suit was stated to be for "Interment rights due as evidenced by note".

An examination of the note discloses no reference to "interment rights". However, the note is an integral part of an agreement to purchase interment rights.

The agreement, which is attached to the claim, provides for:

| | |
|---|---|
| 4 Adult Interment Spaces— | |
| Base Price | $464 |
| Care Deposit | 116 |
| Total Cash Price | $580 |

The finance charge is $129.12, making a deferred payment price of $709.12. Creditor's judgment includes $140.51 attorney fee and court cost of $9.75.



The total debt amounts to:

| | |
|---|---|
| $709.12 | —deferred payment price |
| 140.51 | —attorney fee |
| 9.75 | —court cost |
| $859.38 | |

Creditor's claim, upon a default judgment, includes the deferred payment price of "interment rights", attorney fee and court cost. (It reflects credits of $313.80 and a balance owing of $545.58.)

The installment note upon which suit was brought is nothing more than a note evidencing the terms of the agreement to purchase interment rights.

When debtor got behind in his payments, suit was brought to force him to pay for and receive interment rights in accordance with the agreement and note. Creditor secured a default judgment upon which it bases its claim.

Underlying the judgment is an executory contract to sell. Something remains to be done by the buyer (pay the "full price"), and something remains to be done by the seller (convey the "interment rights").

Until there has been performance, the agreement is executory in nature. Executory contracts may be rejected in bankruptcy cases. The law, as will be cited hereinafter, does not restrict rejections to instances where there has been no lawsuit or judgment.

Executory contracts may be rejected.

In the proceeding now before the court the executory contract has been rejected.

It is burdensome.

At the hearing debtor's wife testified that she "honestly didn't know why" they contracted to purchase the interment rights, and they do not want any member of their family buried in the cemetery.

From the proof and the record it appears creditor has not conveyed any interment rights, and, indeed, would not be obligated to do so until it receives full payment.

Creditor's claim is based upon a default judgment which was taken before the executory contract was rejected. The underlying basis of the judgment is creditor's obligation *under the contract* to convey to debtor four adult interment spaces and provide perpetual care with a total cash value of $580.

Creditor's rights and obligations under the contract are terminated.

Debtor's rights and obligations under the contract are terminated.

The contract was terminated when the court allowed it to be rejected.

Rejection of an executory contract would normally entitle creditor to damages. However, in the present case creditor is released from an obligation with a cash value of $580. When this amount is applied, as it must be in equity, toward satisfaction of the judgment claim (545.58), the debt is more than satisfied.

Accordingly, the court finds that the claim is founded upon no present existing debt. It must be disallowed.

This court cannot be put in the awkward position of allowing the rejection of an executory contract and then ordering specific performance of the contract.



Creditor urges that the claim is on a "judgment", but courts of equity look to substance and not form, and technical considerations will not prevent substantial justice from being done.

The creditor has submitted its claim upon a default judgment to the bankruptcy court for allowance, and the court has full authority to determine the claim and has done so in accordance with the law.

**Conclusions of Law**

The controlling law which governs the controversy now before the court was well stated by the United States Supreme Court in the case of *Pepper v. Litton* (1939), 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281, and in part it states:

> "Courts of bankruptcy are constituted by sections 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction in bankruptcy proceedings.' Consequently this court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' *Local Loan Co. v. Hunt,* 292 U. S. 234, 240, 24 Am. B. R. (N. S.) 668, 671. By virtue of section 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence. *Larson v. First State Bank of Vienna,* S. D. (C. C. A., 8th Cir.); 10 Am. B. R. (N. S.) 588, 21 F. (2d) 936, 938. Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments

'as may be necessary of the enforcement of the provisions' of the act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity and Guaranty Company v. Bray*, 225 U. S. 205, 217, 28 Am. B. R. 207, 216, 217.

"The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. By reason of the express provisions of section 2 these equitable powers are to be exercised on the allowance of claims, a conclusion which is fortified by section 57(k). For certainly if, as provided in the latter section, a claim which has been allowed may be later 'rejected in whole or in part, according to the equities of the case,' disallowance or subordination in light of equitable considerations may originally be made.

"Hence, this court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned, *Boynton v. Ball*, 121 U. S. 457, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. *Wetmore v. Markoe*, 196 U. S. 68, 13 Am. B. R. 1. It may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. *Issacs v. Hobbs Tie & Timber Company*, 282 U. S. 734, 17 Am. B. R. (N. S.) 273. And the bankruptcy trustee may collaterally



attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt." 308 U. S. 295, pp. 303-306.

The most authoritative work on bankruptcy is in accord with the above opinion.

Bankruptcy proceedings are equitable in nature and are administered in accord with the general principles and practices of equity. Collier on Bankruptcy, Vol. 1, 16th Ed., §2.09 at page 171.

The administration and distribution of estates is a proceeding in equity, and the property in the custody of the court is held by it in trust for those to whom it rightfully belongs, and its distribution should be conducted on equitable principles. Collier, supra, §2.42, pp. 269, 270.

In passing on allowance of a claim, the bankruptcy court sits as a court of equity, which gives it far-reaching powers to sift the circumstances surrounding the claim to see that injustice or unfairness is not done. See: Collier, supra, Vol. 3, §57.14, at page 229.

As to the general subject of equitable relief from judgments, 30A Am. Jur., *Judgments*, §750, at page 699 states:

". . . the rule is of ancient origin and well established that there are many situations in which a court of equity may exercise jurisdiction for the purpose of affording appropriate relief from judgments. The judgment from the effect of which relief is sought does not constitute a bar to the equitable relief."

It is also noted in Am. Jur., supra, §756, at page 703:

"Since federal courts are vested with equity powers, the exercise of such powers by them is not curtailed merely

by reason of the fact that the object on which the exercise of such powers is to become operative is a state court judgment."

It is further noted in Am. Jur., supra, §761, at page 707:

"The general rule is that equitable relief from a judgment does not assail the court in which the judgment was rendered. The mandate of the court of equity is not addressed to the court of the rendition of the judgment, and does not operate upon the judgment itself. The court of equity in granting relief neither challenges the integrity of the judgment nor relieves against the law as established thereby. The decree treats all the proceedings at law as valid, and grants relief against the consequences thereof. It adjudges the rights of the parties inter sese in relation to the judgment, is directed to the parties only . . ."

Chapters X, XI, XII, and XIII of the Act are known as rehabilitation chapters. Each has a section permitting rejection of executory contracts of the debtor. Congress in its wisdom apparently felt that a debtor, attempting rehabilitation, should be permitted to reject unwise and burdensome contracts. Under Chapter XIII the Act provides:

"Sec. 613. Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate; . . ."

"Sec. 642. In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy in a prior pending proceeding, any person injured by such rejection shall, for the purpose of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor . . ."



Chapter XIII of the Act was written to provide relief and rehabilitation. Its purpose has been defined by the author of two leading works on bankruptcy and debtor relief as follows:

"Known as a 'debtor' and not as a 'bankrupt', the honest but hard pressed 'wage earner' is offered the helping hand of the federal courts to extricate him from the accumulation of debts incurred through over extension of credit buying or because of illness or other economic exigencies." Nadler, *Debtor Relief*, Sec. 380.

Though deemed a creditor, the court has found in fact that Chattanooga Memorial Park was not damaged by the rejection of its executory contract.

A judgment will be entered in accordance with this memorandum.

/s/ RALPH H. KELLEY
Bankruptcy Judge

## APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Southern Division

In the Matter of:

Lawrence N. Jolly,
Bankrupt

Chattanooga Memorial Park
Appellant

vs.

Lawrence N. Jolly and C. Kenneth Still, Chapter XIII Trustee
Appellees

No. BK-1-75-0187
Chapter XIII

### Memorandum

This is an appeal from an order of a bankrupty judge pursuant to Rule 801, Bankruptcy Rules (11 U.S.C.A. Pamphlet) disallowing a claim in a Chapter XIII proceeding. 11 U.S.C. §§ 1001 *et seq.* The questions presented to this Court being solely questions of law, and the parties agreeing that no hearing is necessary, the case is appropriate for summary disposition.

Initially, there appears to be a dispute as to the scope of issues upon review, the appellant asserting that its descriptive questions are delimiting. The questions posed are:

(1) "Is a bankruptcy court precluded under the doctrine of *res judicata* from cancelling a note which has been merged into a valid judgment in a state court;" and

(2) "Is the note given as payment for an interment contract an executory contract, which can be cancelled by a bankruptcy court?"



Were these questions an accurate statement of the issues on this appeal the Court would have little difficulty in answering both affirmatively and holding for the appellant. Instead, this case is one of first impression as will appear. With regard to the scope of review, the Court may limit itself to those questions presented in the petition for review, *In re Musgrave*, 27 F.Supp. 341 (D.W.Va. 1939). However, the Court's inquiry may extend further and, indeed, beyond those issues presented before the bankruptcy judge. *Winner Corp. v. H. A. Caesar & Co.*, 511 F.2d 1010 (6th Cir. 1975).

Upon a consideration of the record and the briefs filed by both parties, the Court is of the opinion that the issues before the Court are:

(1) Did the bankruptcy judge commit error in going behind a valid state court judgment for the purpose of determining the nature of the underlying obligation when the judgment is submitted as a claim in bankruptcy:

(2) Did the bankruptcy judge commit error in determining that a judgment debt was an integral part of an executory contract and thus that the obligation could be rejected pursuant to section 642 of the Bankruptcy Act, 11 U.S.C. § 1042?

The following statement of facts is undisputed. On July 28, 1972, Lawrence N. Jolly, the appellee, entered into a contract with the Chattanooga Memorial Park, appellant, for "interment rights."[1] The contract provided for payment of $688.80 prin-

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[1] The contract states that:
"the purchaser agrees to buy and the Company agrees to sell the exclusive rights of interments [which rights include] . . . interment spaces listed and for their perpetual care and maintenance . . . .

"THE COMPANY AGREES: . . . (2) . . .
"Upon receipt of the full purchase price, interest and perpetual care deposit, to convey the interment rights in said plot to the purchaser . . . ."

cipal, to be financed by appellee with deferred payments of $14.35 per month, deferred payment price being $728.80. In consideration, appellant contracted to convey interment rights after receipt of the full purchase price, which rights consisted of the "perpetual care and maintenance" of plots within a cemetery. A note was attached as an addendum to the above contract wherein, in consideration of the financing provided by appellant, Jolly promised to pay the sum of $688.80 at monthly installments of $14.35. Both the contract and the note separately provided that, in the event of default on payments, the remaining installments were to become due and payable, at the appellant's option.

Following a number of installments payments, the bankrupt defaulted and the appellant brought an action in state court on the note, not on the contract, for the balance due plus costs. On July 22, 1974, a default judgment for $880.13 was entered, representing $660.10 due on the note and $220.03 attorney's fee, by the General Session Court, Chattanooga, Tennessee. The bankrupt continued to make intermittent and partial payments which were credited toward the contract and on January 1, 1975, the petition in bankruptcy was filed. Appellant thereafter filed its claim with the bankruptcy court for $761.61 which the bankruptcy judge found represented the amount still owing on the judgment.

Under § 613(1) of the Bankruptcy Act and Rule 13-604, BKRCY. RULES, a trustee may reject a claim based upon an executory contract, following which the creditor may refile a claim in the amount to which he was injured by the rejection. The trustee, presuming that the default judgment on the note did not change the executory nature of the underlying contract, so rejected the claim and permitted the appellant to submit a claim instead for its actual damages. The bankruptcy judge, in a memorandum opinion, reaffirmed the trustee's actions.

It is the appellant's position on review that the contract debt had not been submitted as a claim, but instead, the judgment debt had been filed, and that the bankruptcy court's rejection of the judgment as a claim was impermissible under the doctrine of *res judicata*.

Section 602, Chapter XIII, 11 U.S.C. § 1002, incorporates the first seven chapters of the Act, with exceptions not relevant here. The more flexible procedures of Chapter XIII are in part evidenced by the fact that a claim under this chapter need not be "provable," although section 63(a)(1) of the Act makes judgments a primary form of provable debt. Section 606(1), 11 U.S.C. § 1006(1). However, judicial construction of the provisions of the first seven chapters are instructive as to similar provisions in Chapter XIII and will be consulted.

The first issue raised is the effect of a prior state court judgment in bankruptcy. It is clear that under limited circumstances, a bankruptcy court may "look behind the judgment for purposes of proof and allowance." *Pepper v. Litton*, 308 U.S. 295, 303, 84 L.Ed. 281, 287 (1939). In the context of establishing whether a claim was provable or allowable, the Court in *Pepper v. Litton* was seeking to determine the validity of a prior judgment, allowing a bankruptcy court "to disallow it if it is ascertained to be without lawful existence." *Id.* at 305, L. Ed. at 288. Where the validity of the judgment is not at issue, the court is bound by it. *See, United States Rubber Co. v. Poage*, 297 F.2d 670, 673 (5th Cir. 1962).

It is to be noted that the only attack as to the validity of the state judgment in this case is based upon a claim that the underlying contract was usurious. Usury, however, does not amount to a defect affecting validity of a judgment. *Wood v. Todd*, 62 Tenn. 89, — S.W. — (1873).[2] Thus, this Court declines to look

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[2] Appellee cites *In re Timenterial, Inc.*, 3 Collier Bkrcy. Cases 57 (D. Conn. 1974) as authority that this Court may go behind a

behind the judgment for the purpose of setting it aside. *In re Ganet Corp.*, 83 F.2d 945 (2d Cir. 19..). But this holding does not end the inquiry. The Court must still determine what effect, if any, the Tennessee law of *res judicata* has on this suit. *Cf., Harrison v. Bloomfield Bldg. Ind., Inc.*, 435 F.2d 1192 (6th Cir. 1970); *Coleman v. Alcock*, 272 F.2d 618 (5th Cir. 1969). In addition, this Court may yet "look behind" the judgment, not to set it aside, but to determine the nature of the debt upon which the default was entered. *Wetmore v. Markoe*, 196 U.S. 68, 49 L.Ed. 390 (19..).

Generally, the scope of *res judicata* depends upon all matters and facts pleaded and made material by the pleadings, *Lawhorn v. Wellford*, 179 Tenn. 625, 168 S.W.2d 790 (1945), and bars relitigation of any issues which were or could have been raised. *Harrison v. Bloomfield Bldg. Ind., Inc., supra.* In Tennessee, a default judgment, as here, has full *res judicata* effect. *Beare v. Burnett*, 162 Tenn. 610, 39 S.W.2d 737 (1931).

Applying the foregoing principles to this case, the bankruptcy court is precluded from challenging the validity of the note upon which the judgment was entered, and from asking whether it was given for adequate consideration, or whether usurious. For purposes of this appeal, it is conclusive that payments on the note had been accelerated by appellant and that the debt was reduced to judgment.

However, these conclusions in no way alter the relationship of the judgment debt to the underlying contract obligation. Indeed, were this Court to accept appellant's argument that the judgment debt must be separately considered in bankruptcy, appellant would be permitted to make claims both on the judgment and on the contract, the Court being disallowed from recognizing the relationship between them. *See, New York Trust Co. v. Palmer*, 101 F.2d 1 (2d Cir. 1939); 2 REMINGTON ON BKRCY. (1956) § 908.75 ("Only the one claim can properly be allowed . . . and that based on the actual amount of indebtedness, notwithstanding that it is evidenced by multiple promises or instruments. . . .")

judgment. In that case, a prior judgment based upon a default on a loan was successfully collaterally attacked, it being shown that no default had in fact occurred. As such, the decision conforms with *Pepper v. Litton* which permits collateral attack to show that a judgment "was obtained by collusion of the parties or [was] founded upon no real debt." *Id.* at 306, L.Ed. at —.



It appears from the record, and it was so found by the bankruptcy judge, that the note securing the contract obligations constituted a second promise on the part of the appellee to perform his part of the contract. Because the state judgment did not alter the relationship between the note and contract, but simply converted the debt on the note into a "higher debt," 46 AM. JUR.2d "Judgments" §§ 232, 390, the status of claim based upon the judgment is analytically the same as if the note alone had been filed had there been no default judgment, for purposes of determining whether the bankruptcy judge acted within his powers.[3] In this light, it appears that the judge was not in error in viewing the two obligations as part of the one claim.[4]

The judgment debt, thus viewed as a part of the contract, the question remains whether the two constituted an executory contract which may be rejected. Although referenced often, nowhere in the Bankruptcy Act is the term "executory contract" defined. Bankruptcy Act §§ 106(7), 306(4), 406(4), 606(5).

[3] The default judgment does have this effect, however: the bankrupt's *right* to perform the contract, which would not have bound the trustee to perform, *Bailey v. Baker Ice Machine Co.*, 293 U.S. 268, 60 L.Ed. 275 (1915), has become a *duty* to perform the executory contract. However, the status of the contract as being executory is not affected.

[4] The relation between the judgment and contract could have other effects. For example, if appellant were unable to perform its contract obligations, the judgment debt could be set aside under Rule 60.02, TENN. R. CIV. PRO. *See generally*, 7 MOORE'S FED. PRACT. ¶¶ 60.25[2], [4].

Of the constructions given the term, one of the more concise is: "An executory contract is one in which both parties have not yet fully performed their obligations at the time of the filing of the petition." S. RIESENFIELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION (1967), 468. *See also, In re American Magnesium Co.*, 488 F.2d 147, 152 (5th Cir. 1974) ("Both parties had ongoing commitments."); *In re Philadelphia Penn Worsted Co.*, 278 F.2d 661, 663 (3d Cir. 1960) ("any part of the contract unperformed."); J. MACLACHLAN, BANKRUPTCY (1956) § 174 ("bilateral performance of continuing contracts.") The bankruptcy judge's conclusion that performance was yet required by both parties—payment by the bankrupt, transfer of rights by appellant—was not clearly erroneous.

The rejection of executory contracts being permissible in bankruptcy, Bankruptcy Act § 642, 11 U.S.C. § 1042, Rule 13-604, Bankruptcy Rules, the order of the bankruptcy judge will be affirmed.

An order will enter accordingly.

/s/ FRANK W. WILSON
United States District Judge

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## APPENDIX C

No. 76-1794

United States Court of Appeals
for the Sixth Circuit

| | |
|---|---|
| In re Lawrence N. Jolly, Debtor Chattanooga Memorial Park, Plaintiff-Appellant, v. C. Kenneth Still, Chapter XIII Trustee, Defendant-Appellee. | Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division. |

Decided and Filed April 13, 1978

Before: WEICK, PECK and ENGEL, Circuit Judges.

PECK, Circuit Judge. In 1972, Lawrence Jolly purchased the right to four burial spaces in the Chattanooga Memorial Park and pepertual care and maintenance of the spaces by the Park. Jolly made a downpayment of $40.00, and financed the balance of $688.80 (including interest), by executing a negotiable instrument promising to pay 48 installments of $14.35 each. The contract included an acceleration clause, providing that in the event of default by the purchaser, the Memorial Park had the option of cancelling the contract and retaining any sums paid as liquidated damages, or declaring the balance under the contract immediately due and payable. While the impact of such clauses is undeniably harsh at times, they are clearly legal and enforceable under Tennessee law, so long as the power to accelerate is exercised under a good faith belief

that the prospect of payment has been impaired. Tenn. Code Ann § 47-1-208.

Jolly was unable to perform the contract, and paid only two installments over the next two years. In 1974, the Memorial Park exercised its option to accelerate, and brought suit on the note seeking the balance due plus attorney's fees (also provided for in the contract). Jolly failed to appear, and a default judgment was entered against him for $880.13 plus costs. Some payments were made toward satisfaction of the judgment, but a few months later, when Jolly filed a Chapter XIII Wage Earner's petition, $761.61 was still owed to the Park.

The Memorial Park filed a claim for $761.61, but the Chapter XIII trustee filed a Trustee's Statement of Executory Contract rejecting the contract, and disputing the amount of the claim. The Bankruptcy Court permitted rejection of the contract, and disallowed Memorial Park's claim. It concluded that there were no damages due Memorial Park, because any damages caused by the rejection were more than covered by the amount already paid. This decision was upheld by the district court.

Chapter XIII Wage Earner's Plans provide debtors with an alternative to straight bankruptcy. Rather than liquidation and discharge, the debtor keeps his assets, and pays his debts entirely through future earnings. While debt repayment is extended, the expectation is that most creditors eventually will be paid off in full. In the meantime, the debtor avoids the stigma of bankruptcy as well as harassment from worried creditors.

As in Chapter XI Reorganization Plans, a Wage Earner's Plan may include provisions rejecting executory contracts. 11 U.S.C. § 1046(6), Bankruptcy Act § 646(6). Such rejections serve a dual purpose; they relieve the debtor of burdensome future obligations during the period that he is trying to



recover financially, and they constitute a breach of the contract, making the other party to the contract a creditor with a claim which may be incorporated into the Plan and ultimately discharged. 11 U.S.C. § 1042, Bankruptcy Act § 642.

The issue to be resolved on appeal is whether the executory contract provisions of Chapter XIII have any application to a contract, like this one, which has already been breached by the debtor and reduced to final judgment. We conclude that they are inapplicable, and that the bankruptcy court was in error in refusing to accept the claim of the Memorial Park.

Congress did not provide the courts with a definition of "executory contracts," except to the extent that a lease is an example. 11 U.S.C. § 1006(5), Bankruptcy Act § 606(5). As many courts and commentators have pointed out, the phrase is meaningless; once a contract ceases being executory, for all practical purposes, it ceases to exist. An example of the difficulty faced by the courts in deciding what Congress intended is the case of *In re National Tile and Terrazzo Co.*, 537 F.2d 329 (9th Cir. 1976). In that case the debtor had purchased some stock, paid for in part with a promissory note. Payments on the note were regularly made until the debtor filed bankruptcy. The majority held that the question as to whether the note was an executory contract within the meaning of the Bankruptcy Act was irrelevant because the note was unenforceable as a matter of law. A concurring opinion insisted that the note was a "classic executed contract," while the dissent argued vigorously that it was executory. A definition frequently used by the courts is "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973).

Such definitions are helpful, but do not resolve this problem. The key, it seems, to deciphering the meaning of the executory contract rejection provisions, is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, then the contract is not executory within the meaning of the Bankruptcy Act.

Pursuant to a strong Congressional policy of rehabilitating a debtor as effectively as possible by letting in the largest possible number of creditors, the rejection provisions were set up to deal with the problem demonstrated by a longterm lease held by the debtor. It is often clear that the lease will be a burden. The debtor may have no need for it or may simply be unable to pay the rent as it falls due in the future. At the same time, "the holder of an executory contract is in an equivocal position. Until his contract is rejected, he is not a creditor with a provable claim." *In re Greenpoint Metallic Bed Co.*, 113 F.2d 881, 884 (2d Cir. 1940). Of course, the concept of a "provable claim" does not apply to a Chapter XIII proceeding, but the reason the claim is not provable in straight bankruptcy is because there is no claim at all—nothing is owed to the other party at the time of the bankruptcy proceeding.

Thus, executory contracts involve obligations which continue into the future. S. Rep. No. 94-458, 94th Congress, 1st Sess. (1975). They include leases, employment contracts and agreements to buy or sell in the future. Generally, they are agreements which include an obligation for the debtor to do something in the future. In this case there is no obligation for the debtor to do anything in the future. His duty was in the past, he has breached that duty, and had judgment entered against him for that breach. *Matter of Commodity Merchants, Inc.*, 538 F.2d 1260, 1263 (7th Cir. 1976) ("The bankruptcy trustee no longer seriously argues that the contracts were ex-



ecutory. . . . The purchase contract had already been breached by CMI.").

The fact that part of the purpose of rejection is to reduce the burden on the estate does not change this result. All debts and obligations are burdens on the estate. The mere fact that Jolly might be better off without his burial plots is irrelevant; many Chapter XIII debtors would be better off without the goods and services they overextended themselves to obtain. The only obligations Congress allows debtors to reject are executory ones, and only at the cost of any damages rejection may cause. The choice given a trustee faced with an executory contract is whether breach or affirmance will be of the greatest benefit to the estate. When a contract has already been breached, that choice is no longer available.

A leading bankruptcy authority, interpreting identical provisions under Chapter XI, points out that the rejection provisions have no applicability to a contract which has already been breached, and that "if there was an actual or anticipatory breach of an executory contract by the debtor prior to the commencement of a case under the Act . . . a claim for damages based thereon is provable, and the holder of the claim is an actual creditor." 9 *Collier on Bankruptcy* § 7.15 [4.2] at 79. Since this is true, there is no need for the rejection procedures, which create a breach and make the other party a creditor. In this case, not only has there already been a breach, creating a claim, but the claim has already been reduced to final judgment. That judgment, fixing the amount of the claim, is conclusive and may not be collaterally attacked in the bankruptcy court. No suggestion has been made that the state court was without jurisdiction, or that the judgment was obtained through extrinsic fraud or collusion, which would justify disregarding the prior judgment and redetermining the fact or amount of liability. *Pepper v. Litton*, 308 U.S. 295 (1939).

Essentially, what the trustee wants to do here is ignore the fact that there has already been a breach and judgment as to damages on that breach, and start all over with a new breach and new determination of damages. This striking departure from the rules of res judicata is neither expressly permitted under the Bankruptcy Act nor reasonably inferred from its purposes. The Chapter XIII trustee predicts that our decision will undermine the Congressional intent in providing for the rejection of executory contracts. He argues that anyone with an executory contract who wants to evade the rejection procedures can do so simply by obtaining judgment. The argument is without merit. The holder of an executory contract has no cause of action; there has not been a breach and no performance is due from the debtor. If it has been breached, and judgment obtained, the precise goal of the rejection provisions has already been accomplished. The claim has been reduced to money damages which can be included in the Wage Earner Plan and discharged along with the rest of the debtor's obligations. It is no longer an open question whether there might be more equitable, less burdensome means of discharging the debtor on this contract. That has been determined by the state court and cannot be challenged here.

The decision of the district court is reversed and the cause is remanded for further proceedings consistent with the opinion.

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## APPENDIX D

No. 76-1794

United States Court of Appeals
For the Sixth Circuit

In re Lawrence N. Jolly, Debtor Chattanooga Memorial Park,
Plaintiff-Appellant,
v.
C. Kenneth Still, Chapter XIII Trustee,
Defendant-Appellee.

### Order

(Filed June 6, 1978)

Before: Weick, Peck and Engel, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by defendant-appellee, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore Ordered that the petition for rehearing be and it hereby is denied.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, Clerk of Court

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## APPENDIX E

No. 76-1794

In the United States Court of Appeals
For the Sixth Circuit

| | |
|---|---|
| In re:<br>Lawrence N. Jolly, Debtor Chattanooga Memorial Park,<br>Plaintiff-Appellant,<br>v.<br>C. Kenneth Still, Chapter XIII Trustee,<br>Defendant-Appellee. | Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division<br>[Denied, /s/ Peck] |

**Motion for Stay of Mandate**

(Filed June 26, 1978)

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

Defendant-Appellee, C. Kenneth Still, by and through his attorney respectfully presents this, his application for, and moves the Court to enter, an order staying the issuance of mandate in this case, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, and under the provisions of §2101(f), Title 28, United States Code, because it is the bona fide intention of said Appellee to make proper and timely application to the Supreme Court of the United States of America for Writ of Certiorari, pursuant to 28 USC §§2101 and 1254 and United States Supreme Court Rule 19 to review the decision and judgment rendered in favor of the Plaintiff-Appellant in the instant case.

* * * * * * *



A card was also received by Petitioner which read as follows:

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

| | |
|---|---|
| Lawrence J. Jolly Chattanooga Memorial Park<br>vs.<br>Lawrence N. Jolly, et al. | No. 76-1794 |

Dear Counsel:

Please be advised that pursuant to Rule 41(a), Federal Rules of Appellate Procedure, this Court's mandate has today issued in the above entitled case.

Costs in the amount of $ -0- have been taxed against the appellant appellee.

Dated June 29, 1978.

Very truly yours,
John P. Hehman, Clerk

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## APPENDIX F

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

August 3, 1978

Lawrence R. Ahern, III, Esquire
Tenth Floor, Volunteer Building
Chattanooga, Tennessee 37402

Re: *C. Kenneth Still, Chapter XIII Trustee v. Chattanooga Memorial Park, A-128*

Dear Mr. Ahern:

Your application for stay in the above-entitled case has been presented to Mr. Justice White in the absence of Mr. Justice Stewart. Justice White has endorsed thereon the following:

"The application for stay
is denied
Byron R. White
Assoc. Justice
8/1/78"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ FRANCIS J. LORSON
FRANCIS J. LORSON
Deputy Clerk

th

cc: Allison G. Ulin, Esquire
Paty, Lawrence, Rymer & Uline
17-19 Patten Parkway
Chattanooga, Tennessee

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## APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

June 28, 1978

Lawrence R. Ahern, III, Esquire
Miller & Martin
10th Floor, Volunteer State Life Bldg.
Chattanooga, Tennessee 37402

Re: *In re Lawrence N. Jolly, etc.*

Dear Mr. Ahern:

Pursuant to our phone conversation on June 26, 1978, I am returning your application for an extension of time in the above-entitled case. Your time to file a petition for a writ of certiorari runs from the time of denial of rehearing of the United States Court of Appeals for the Sixth Circuit. I direct your attention to ***U.S. v. Healy***, 376 U.S. 75.

Apparently, you have until September 4, 1978 to file your petition.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ TIMOTHY J. ALUISE
TIMOTHY J. ALUISE
Assistant Clerk

th

Enc.

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## APPENDIX H

### 11 U.S.C. § 1013

**Bankruptcy Act § 613**

Sec. 613. Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—

(1) permit the rejection of executory contracts of the debtor, upon notice of the parties to such contracts and to such other parties in interest as the court may designate;

### 11 U.S.C. § 1042

**Bankruptcy Act § 642**

Sec. 642. In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy in a prior pending proceeding, any person injured by such rejection shall, for the purpose of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. The claim of the landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be provable, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to the date of surrender or reentry: *Provided*, That the court shall scrutinize the circumstances of an assign-



ment of a future rent claim and the amount of the consideration paid for such assignment in determining the amount of damages allowed the assignee thereof.

### 11 U.S.C. § 1046(6)

**Bankruptcy Act § 646(6)**

Sec. 646. A plan under this chapter—

(6) may include provisions for the rejection of executory contracts of the debtor; and

**Rules of Bankruptcy Procedure**

**Rule 13-604**

REJECTION OF EXECUTORY CONTRACTS

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may designate.

Supreme Court, U.S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-374

In re:

LAWRENCE N. JOLLY, DEBTOR
C. KENNETH STILL, CHAPTER XIII, TRUSTEE, Petitioner,

v.

CHATTANOOGA MEMORIAL PARK, Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

PATY, LAWRENCE, RYMER & ULIN
By: PHILLIP C. LAWRENCE
17 Patten Parkway
Chattanooga, Tennessee 37402
(615) 756-6770
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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# SUPREME COURT OF THE UNITED STATES

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LAWRENCE N. JOLLY, DEBTOR
C. KENNETH STILL, CHAPTER XIII, TRUSTEE, Petitioner,

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Respondent submits that the decision of the Court of Appeals does not raise any substantial question of Federal law nor does the decision conflict with applicable decisions of the Supreme Court or other Courts of Appeal.

As indicated in its decision, the Court of Appeals considered the definition of executory contract in accordance with the rulings of this Court and considered the objectives of the Bankruptcy Act and correctly determined with regard to the debtor's obligation to Chattanooga Memorial Park that:

> If it has been breached, and judgment obtained the precise goal of the rejection provisions has already been accomplished. The claim has been reduced to money damages which can be included in the wage earner plan and discharged along with the rest of the debtor's obligations. It is no longer an open question whether there might be more equitable, less burdensome means of discharging the debtor on this contract. That has been determined by the State Court and cannot be challenged here. (Appendix—24)

The decisions cited by petitioner are either factually dissimilar and inapplicable, or in harmony with the Court of Appeals decision. None of the cases mentioned dealt with an obligation reduced to judgment. The Court of Appeals correctly found that there was no executory obligation on the part of the debtor to be rejected by the trustee. "His duty was in the past, he has breached that duty, and had judgment entered against him for that breach." (Appendix—22) There is no substantial question for this Court's consideration.

## CONCLUSION

For the above-stated reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

PATY, LAWRENCE, RYMER & ULIN

By: PHILLIP C. LAWRENCE
17 Patten Parkway
Chattanooga, Tennessee 37402
(615) 756-6770
Attorneys for Respondent